

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION

) MDL No. 1917

) Case No. C-07-5944-SC

This Order Relates To:

Best Buy Co., Inc., et al. v.  
Hitachi, Ltd., et al., No. 11-cv-  
05513-SC;

) ORDER DENYING BEST BUY'S  
) OBJECTIONS TO THE SPECIAL  
) MASTER'S ORDER GRANTING IN  
) PART AND DENYING IN PART  
) MOTION FOR PROTECTIVE ORDER

Best Buy Co., Inc., et al. v.  
Technicolor SA, et al., No. 13-cv-  
05264-SC

**I. INTRODUCTION**

Now before the Court is Direct Action Plaintiffs ("DAPs") the Best Buy entities'<sup>1</sup> ("Best Buy") objection to the Special Master's<sup>2</sup> Order ("Order") granting in part and denying in part Best Buy's motion for protective order. ECF No. 2689 ("Objection") (filed

<sup>1</sup> The Best Buy entities are Best Buy Co, Inc., Best Buy Purchasing LLC, Best Buy Enterprise Services, Inc., Best Buy Stores, L.P., BestBuy.Com, LLC, and Magnolia Hi-Fi, LLC. ECF No. 2689 ("Objection") at 1 n.1.

<sup>2</sup> On December 17, 2013 the Court appointed the Honorable Vaughn R. Walker, United States District Judge (Retired), as a Special Master to assist the Court with discovery matters. ECF No. 2272.

1 under seal).<sup>3</sup> Defendants oppose Best Buy's objection, and argue  
2 the Court should deny the objection and affirm the Special Master's  
3 order. ECF No. 2685 ("Response"). Although Best Buy requests the  
4 Court order a hearing and set a briefing schedule as permitted by  
5 Local Rule 72-2, the Court finds neither is necessary. See Civ.  
6 L.R. 72-2 ("Unless otherwise ordered by the assigned District  
7 Judge, no response need be filed and no hearing will be held  
8 concerning the motion. The District Judge may deny the motion by  
9 written order at any time . . . ."). As a result, Best Buy's  
10 objection is ripe for disposition without oral argument. Civ. L.R.  
11 7-1(b). As set forth below, the Court AFFIRMS the Special Master  
12 and DENIES the objection.

## 13 14 **II. BACKGROUND**

15 The parties are familiar with the factual and procedural  
16 background of the case, so an exhaustive review is unnecessary.  
17 The facts relevant to the motion are set forth below. Defendants  
18 are allegedly manufacturers of cathode ray tubes ("CRTs") and, in  
19 some cases, of finished products as well. Best Buy, along with the  
20 other DAPs, alleges that Defendants conspired to fix prices for  
21 CRTs. The DAPs do not allege that Defendants conspired to fix the

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22  
23 <sup>3</sup> Best Buy previously filed an objection to the Special Master's  
24 order that exceeded the five page limit under Civil Local Rule 72-  
25 2. ECF No. 2677. After Defendants pointed out the issue, Best Buy  
26 filed an amended version. ECF No. 2689. The Court's order  
27 appointing the discovery master sets forth the procedure for  
28 objections to the Special Master's orders and incorporates the  
procedures (including page limits) contained in Civil Local Rule  
72-2. ECF No. 2272, at 4-5. Accordingly, Best Buy's earlier  
objection is STRICKEN except for the accompanying Declaration of  
David Martinez and exhibits containing the record necessary for the  
Court's review of the Special Master's order. ECF No. 2677-1  
(filed under seal).

1 prices of products containing CRTs. Each DAP alleges that it  
2 bought at least one CRT product from a defendant or an entity owned  
3 or operated by a defendant.

4 On May 16, 2014, Best Buy filed a motion for a protective  
5 order barring discovery into Best Buy's competitive intelligence  
6 practices before the Special Master. ECF No. 2677-1 ("Martinez  
7 Decl.") Ex. 1 ("Mot.") at 1 (filed under seal). The competitive  
8 intelligence practices are a part of Best Buy's broader price match  
9 guarantee program, by which Best Buy agrees to match any lower  
10 prices offered by their competitors. Mot. at 2. These practices  
11 amount to: (1) contacting competitors to confirm customers'  
12 pricing, (2) monitoring competitor advertisements and other records  
13 publicly displaying pricing information, and (3) subscribing to  
14 industry analyst reports and attending analyst calls. Id.

15 Defendants seek two forms of discovery into Best Buy's  
16 competitive intelligence practices. First, they seek to depose  
17 Best Buy's Rule 30(b)(6) designee regarding Best Buy's:

18 [P]ractices, policies and procedures concerning Your  
19 market monitoring activities for CRT Finished Products  
20 including, but not limited to the following: (a) Your  
21 competitive intelligence activities; (b) Your use of  
22 third-party data sources and market share/data analyses;  
23 and (c) Your knowledge, use and tracking of Your  
24 competitor's [sic] pricing for CRT Finished Products  
25 during the Relevant Time Period . . . .

26 Objection at 2-3. Second, Defendants propounded two  
27 interrogatories also seeking information regarding the competitive  
28 intelligence practices, including (1) the participation of Best  
Buy's executives in the competitive intelligence practices or other  
market monitoring activities, and (2) Best Buy's "executives",

1 employees', or agents' participation in any meetings with [Best  
2 Buy's] competitors." Id. at 3.

3 In the briefing before the Special Master, Best Buy argued  
4 that the information sought in these requests was irrelevant under  
5 Supreme Court precedent and subsequent case law, and, even if  
6 relevant, the burden of ordering discovery outweighed any potential  
7 benefit. Mot. at 4-9. Defendants disagreed, arguing that the  
8 information sought was both relevant and discoverable. Martinez  
9 Decl. Ex. 2 ("Opp'n") at 2 (filed under seal). After a telephone  
10 conference on June 23, 2014 at which both Best Buy and Defendants'  
11 counsel were heard, the Special Master issued an order denying Best  
12 Buy's motion as to the Rule 30(b)(6) deposition and granting a  
13 protective order as to the interrogatories. On July 7, 2014, Best  
14 Buy filed an objection with the Court seeking review of the Special  
15 Master's order. ECF No. 2677.

16  
17 **III. LEGAL STANDARDS**

18 **A. Review of Orders by the Special Master**

19 The Court reviews the Special Master's factual findings for  
20 clear error, his legal conclusions de novo, and his procedural  
21 decisions for abuse of discretion. Fed. R. Civ. P. 53(f)(3)-(5);  
22 ECF No. 302 (appointing the initial special master).

23 **B. Motion for Protective Order**

24 Federal Rule of Civil Procedure 26(c) permits the Court, upon  
25 a showing of good cause, to "issue an order to protect a party or  
26 person from annoyance, embarrassment, oppression, or undue burden  
27 or expense." The Court must undertake a two-step inquiry in  
28 deciding whether the information sought is discoverable. First,

1 the Court must determine if the material sought is "relevant to any  
2 party's claim or defense." Id. at (b)(1). Such evidence need not  
3 be clearly admissible at trial so long as the request is  
4 "reasonably calculated to lead to the discovery of admissible  
5 evidence." Id. Second, the Court must weigh the burden of the  
6 discovery sought against its likely benefit. Id. at  
7 (b)(2)(C)(iii).

#### 8 9 **IV. DISCUSSION**

10 While Best Buy's objection dices the issues differently, their  
11 objection challenges the Special Master's answers to two key  
12 questions. First, is evidence of how Best Buy's competitive  
13 intelligence practices function relevant, particularly given the  
14 Supreme Court's decision in Kiefer-Stewart Co. v. Joseph E. Seagram  
15 & Sons, Inc., 340 U.S. 211 (1951) and subsequent case law? Second,  
16 if such evidence is relevant, does the burden of discovery outweigh  
17 its likely benefit? The Court reviews the Special Master's  
18 decisions on both questions de novo.

##### 19 **A. Relevance of the Competitive Intelligence Program**

20 First, Best Buy argues, citing the Supreme Court's decision in  
21 Kiefer-Stewart and subsequent cases, that the evidence sought is  
22 irrelevant because "[i]t is black letter law that evidence of an  
23 antitrust plaintiff's own conduct is irrelevant and cannot excuse  
24 the defendants' conspiratorial conduct." Mot. at 5 (citing Perma  
25 Life Mufflers v. Int'l Parts Corp., 392 U.S. 134, 139-40 (1968);  
26 Kiefer-Stewart, 340 U.S. at 214, overruled on other grounds,  
27 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 781-82  
28 (1984); Memorex Corp. v. IBM Corp., 555 F.2d 1379, 1381-82 (9th

1 Cir. 1977); Wilk v. Am. Med. Ass'n, 719 F.2d 207, 232 (7th Cir.  
2 1983)). Anticipating some of Defendants' arguments in opposition,  
3 Best Buy cites cases from other district courts rejecting several  
4 arguments as to the relevance of a plaintiff's communications with  
5 third parties or sales practices. See, e.g., In re Polyester  
6 Staple Antitrust Litig., No. 3:03CV1516, 2005 WL 6457181, at \*4  
7 (W.D.N.C. May 9, 2005) (rejecting relevance argument based on the  
8 need to "rebut any inference that communication amongst competitors  
9 necessarily means the parties are engaging in an illegal  
10 conspiracy"); In re Auto. Refinishing Paint Antitrust Litig., No.  
11 MDL 1426, 2006 WL 1479819, at \*8 (E.D. Pa. May 26, 2006) (casting  
12 aside the contention that discovery might show, inter alia, the  
13 highly competitive nature of the relevant industry, and the prices  
14 that "Defendants may have charged in a 'but for' world"); In re  
15 Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 WL 2275528,  
16 at \*4 (E.D. Pa. Apr. 8, 2008) (denying a motion to compel as to  
17 plaintiffs' communications with third parties despite the argument  
18 such communications were relevant to show "buying power, market  
19 position and demand elasticity"). Finally, Best Buy argues that  
20 the policy concerns underlying the antitrust laws would be  
21 undermined by permitting discovery into downstream activities.  
22 Mot. at 7 (citing Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431,  
23 433-34 (N.D. Cal. 2008)).

24 In opposition, Defendants offer three reasons why the  
25 discovery they seek is relevant. First, Defendants argue that  
26 discovery into the competitive intelligence program is relevant  
27 because it shows how Best Buy and their competitors priced their  
28 products. Opp'n at 2. This is likely to lead to the discovery of

1 admissible evidence here, Defendants contend, because the indirect  
2 purchaser plaintiffs ("IPPs") claim that Best Buy and other  
3 retailers passed on 100 percent of the conspiratorial CRT  
4 overcharges and because Best Buy is likely to be an important  
5 third-party witness in the IPPs' case. Id. Second, Defendants  
6 claim that discovery into the competitive intelligence program is  
7 relevant to Best Buy's ability to show injury-in-fact. Id. at 10-  
8 11. Finally, Defendants contend that the discovery sought is  
9 relevant as it will enable them to rebut charges by Best Buy (or  
10 other plaintiffs) that competitor contacts and price monitoring is  
11 indicative of a conspiracy. Id. at 11-13. In support of these  
12 arguments Defendants rely principally on two cases. First, they  
13 cite to Judge Illston's orders, also involving Best Buy's  
14 competitive intelligence practices, in the In re TFT-LCD Flat Panel  
15 Antitrust Litigation, No. 07-MD-1827 (N.D. Cal.). In the TFT  
16 cases, Best Buy submitted to discovery on their competitive  
17 intelligence practices, the Court denied a motion in limine to  
18 exclude evidence obtained regarding those practices, and the  
19 evidence was admitted in both the direct purchaser trial and  
20 individual opt-out trials. Opp'n at 11-12, n.38 (citing 07-MD-1827  
21 (N.D. Cal.) ECF Nos. 5776, 8298). Second, Defendants argue that In  
22 re Urethane Antitrust Litigation, No. 04-MD-1616-JWL, 2010 WL  
23 5287675 (D. Kan. Dec. 17, 2010) is "precisely on point." Opp'n at  
24 12. In Urethane, the Magistrate Judge granted a motion to compel  
25 responses to discovery requests seeking information related to  
26 plaintiffs' communications with competitors, finding that the  
27 information sought was potentially relevant to "refute plaintiffs'  
28 claims that similar conduct by defendants is indicative of

1 collusion." Id. at \*5; see also In re Urethane Antitrust Litig.,  
2 No. 04-1616-JWL, 2011 WL 1327988, at \*5-6 (D. Kan. Apr. 5, 2011)  
3 (affirming the Magistrate's decision).

4 In his order, the Special Master rejected Best Buy's argument  
5 that the discovery sought was irrelevant. Specifically, the  
6 Special Master found that:

7 Discovery directed to the settling of prices for finished  
8 products charged by Best Buy and other retailers could  
9 well lead to discovery of relevant evidence concerning  
10 the extent to which, if at all, alleged overcharges were  
11 passed on by Best Buy and/or by entities above Best Buy  
in the distribution channels for products containing CRTs  
as well as both the fact of damages and their amounts, if  
any.

12 Order at 1. In doing so, the Special Master disagreed with Best  
13 Buy's reliance on Kiefer-Stewart and other cases discussing  
14 discovery into an antitrust plaintiff's practices and competitor  
15 contacts. Id. Nonetheless, the Special Master did remark that  
16 subpart (g) of Interrogatory No. 16, which requests Best Buy  
17 identify its "executives", employees' and agents' participation in  
18 any meetings with" competitors, "seems foreclosed by the Keifer-  
19 Stewart line of cases." Id. at 2.

20 The Court agrees with the Special Master in every relevant  
21 respect.<sup>4</sup> Here, the discovery sought is relevant for three

22 <sup>4</sup> The Court does question the Special Master's conclusion that the  
23 type of inquiry in Interrogatory No. 16(g) would be barred by the  
24 Kiefer-Stewart line of cases. The Court would agree with this view  
25 were it to find, as it seems the Special Master did, that discovery  
26 into Best Buy's competitive intelligence practices is relevant only  
27 as to the issues of pass-through and damages. However the Court  
28 goes a step further than the Special Master and finds that the  
discovery sought by Defendants is also relevant to rebut any  
charges that competitive contacts and price monitoring are  
circumstantial evidence of an illegal conspiracy. See Urethane,  
2011 WL 1327988, at \*6. Nonetheless, as discussed infra, the Court  
concurs with the Special Master's weighing of the burdens and  
benefits of Defendant's interrogatories. Therefore, the Special



1 reasons.

2 First, the Court concurs with the Special Master's conclusion  
3 that Kiefer-Stewart and its progeny do not bar all discovery into  
4 an antitrust plaintiff's activities. Specifically, Kiefer-Stewart  
5 concluded that antitrust violations by a plaintiff cannot immunize  
6 defendants from liability for their own violations. 340 U.S. at  
7 214. While the subsequent cases cited by Best Buy apply various  
8 aspects of that principle to the discovery context, Best Buy has  
9 not offered any support for the blanket contention that an  
10 antitrust plaintiff's activities are always irrelevant and outside  
11 the scope of discovery. To the contrary, as one of Best Buy's  
12 cases concluded, information about plaintiffs' activities is  
13 relevant in cases, such as this one, where the amount of any pass-  
14 through to indirect purchasers is likely to be an issue. See,  
15 e.g., Polyester Staple, 2005 WL 6457181, at \*4-5 (concluding that  
16 discovery into downstream activities by plaintiffs was potentially  
17 relevant to the amount of any pass-through). Simply because  
18 Defendants cannot claim that Best Buy's activities immunize them  
19 from liability does not mean the information sought cannot be  
20 relevant for other purposes.

21 Second, and relatedly, Best Buy's argument that "the policy  
22 precluding discovery into an antitrust plaintiff's conduct bars  
23 Defendants' discovery irrespective of any relevance" also fails.  
24 Objection at 4. It may be true that the policy underlying the  
25 antitrust laws militates against permitting broad discovery against  
26 antitrust plaintiffs where, for instance, the discovery sought

27  
28 Master's decision granting in part and denying in part the motion  
need not be disturbed.

1 would simply enable the defendant to shift attention away from an  
2 otherwise illegal and actionable scheme or assert an improper pass-  
3 on defense. However such a policy is not implicated in this case.  
4 Unlike the situation at issue in the cases cited by Best Buy, here  
5 discovery about the downstream pricing activities of Best Buy is  
6 not being sought to allege a price fixing conspiracy by Best Buy.  
7 Accordingly, permitting discovery here does not run the risk of  
8 chilling private enforcement of the antitrust laws, as in the cases  
9 offered by Best Buy. See, e.g., Perma Life Mufflers, 392 U.S. at  
10 139-40; Meijer, 251 F.R.D. at 433-34. Instead, Defendants are  
11 seeking the instant discovery because it is directly relevant to  
12 the question of how, and in what amount, any potential overcharges  
13 were passed through to other plaintiffs.

14 Best Buy dedicates much of its reply brief and objection to  
15 two remaining points. First, Best Buy contends that discovery into  
16 the results of the competitive intelligence practices, which they  
17 concede might be relevant, would simply be duplicative given the  
18 extent of previous discovery on pass-through. Second, Best Buy  
19 argues that the court should distinguish between this allegedly  
20 completed discovery on pass-through and discovery into "how Best  
21 Buy obtained competitor information," which they argue is wholly  
22 irrelevant. The Court is unmoved. First, Best Buy's complaints  
23 about having already submitted to discovery into its pricing  
24 practices and their relevance to the pass-through issue go to the  
25 Court's weighing of the benefits and burdens of discovery -- not to  
26 the relevance issue. Second, even if the distinction between the  
27 pass-through itself and "how" the competitive intelligence program  
28 works were a meaningful one, that distinction would only undermine

1 Defendants' arguments as to pass-through and damages. Evidence of  
2 how the competitive intelligence program operates might still be  
3 admissible (or at least lead to the discovery of admissible  
4 evidence) at trial to rebut allegations that competitor contacts  
5 and price monitoring are indicative of the existence of a  
6 conspiracy as they were in TFT. See also Urethane, 2011 WL  
7 1327988, at \*6.

8 As a result the Court concurs with the Special Master's  
9 findings as to the relevance of the discovery sought here. The  
10 discovery sought by Defendants is relevant to the issues of pass-  
11 through, injury, and to rebut any argument that competitor  
12 communications and price monitoring are indicative of an improper  
13 conspiracy.

14 **B. Weighing the Burdens and Benefits of Discovery**

15 Next, the Court must weigh the burden of discovery against its  
16 likely benefits. Fed. R. Civ. P. 26(b)(2)(C)(iii). In doing so,  
17 the Court considers "the needs of the case, the amount in  
18 controversy, the parties' resources, the importance of the issues  
19 at stake in the action, and the importance of discovery in  
20 resolving those issues." Id.

21 In Best Buy's briefing before the Special Master, it argued  
22 that because it has already submitted to prior discovery on the  
23 issue of pass-through and competitive contacts, the burden of  
24 discovery is greater than its likely benefit. Specifically, Best  
25 Buy points to a 2012 document production and prior 30(b)(6)  
26 deposition involving information relevant to Best Buy's pricing and  
27 "the competitive landscape," as rendering the current requests  
28 duplicative and burdensome. Mot. at 2-3. Further, they complain

1 that the 30(b)(6) deposition at issue involves 26 topics, including  
2 "dozens of sub-topics." Id. at 9. Defendants counter, noting the  
3 enormous financial stakes in this case, and contending that Best  
4 Buy mischaracterized the extent of discovery already taken in this  
5 case. Opp'n at 2-3, 14. Specifically, they note that "[t]here is  
6 nothing extraordinary or burdensome about requiring a corporate  
7 plaintiff to submit to a deposition, even if it involves multiple  
8 days or deponents, particularly where, as here, a discovery  
9 protocol explicitly allows just such a scenario." Id. at 14.  
10 Furthermore, Best Buy complains that in the time since the Special  
11 Master's order, Defendants have noticed four more depositions which  
12 they apparently intend to take between now and September 5, 2014.  
13 Objection at 3.

14 The Special Master concluded that while the burden of  
15 responding to Defendants' interrogatories outweighed the benefits,  
16 the same was not true with regard to the 30(b)(6) deposition. The  
17 Court agrees. First, and most importantly, as the Court has  
18 already concluded, the discovery sought here is relevant and  
19 important not just to parties' claims or defenses, but to one of  
20 the most central remaining issues in the litigation -- the question  
21 of pass-through. Given the centrality of this issue to the case,  
22 the Court is loath to deny discovery on the issue to any party.  
23 Second, as mentioned above, the amount in controversy in this case  
24 is enormous, and, as in any complex multidistrict litigation, the  
25 parties have all submitted to and propounded extensive discovery.  
26 Third, the parties are all sophisticated, well-advised by able (and  
27 expensive) lawyers, and certainly not lacking in resources.

28 Finally, additional factors convince the Court that the

1 Special Master appropriately weighed the burden of discovery.  
2 First, the objected deposition topic on the competitive  
3 intelligence program is only one of 26 topics to be covered at the  
4 30(b)(6) deposition -- the remainder of which Best Buy does not  
5 object to. Furthermore, as Defendants state (and Best Buy does not  
6 dispute), the parties understood that Defendants would take further  
7 30(b)(6) deposition testimony once Best Buy completed document  
8 discovery. Particularly when compared to the level of detail  
9 required by Interrogatories Nos. 16 and 17, examination on this  
10 issue in a 30(b)(6) deposition would entail significantly less  
11 expenditure of time, money, and effort. Further militating in  
12 favor of the deposition and against the interrogatories, the Court  
13 shares the Special Master's concern that requiring answers to the  
14 interrogatories may require Best Buy to go through a lengthy and  
15 expensive process of reviewing its competitive intelligence  
16 program's records to identify what may well be a large number of  
17 individuals who participated in the program. It seems unlikely  
18 that this inquiry, if completed would lead to the discovery of  
19 significant evidence above that gained in the 30(b)(6) deposition.

20 **IV. CONCLUSION**

21 As a result, the Court AFFIRMS the Special Master's order  
22 granting in part and denying in part Best Buy's motion for a  
23 protective order and DENIES Best Buy's objection.

24  
25 IT IS SO ORDERED.

26  
27 Dated: July 28, 2014



UNITED STATES DISTRICT JUDGE